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4. Appeal and Error (§ 1053 (3*))—Harmless Error—Admission of Evidence.—In a personal injury suit, evidence of ice on a trestle improperly admitted because not alleged in declaration, and not stricken out on motion, held cured by an instruction that, if ice was proximate cause of injury, there was no liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. § 1053 (3); Trial, Cent. Dig. § 977.* 1 Va.-W. Va. Enc. Dig. 619.]

Error to Circuit Court of City of Danville.

Action by J. D. Lopford against the City of Danville. From a judgment for plaintiff, defendant brings error. Affirmed.

E. Walton Brown, of Danville, for plaintiff in error.

B. H. Custer, of Danville, for defendant in error.

KLAFF *v.* VIRGINIA RY. & POWER CO.

Jan. 11, 1917.

[91 S. E. 173.]

Pleading (§ 11*)—Setting out Evidence.—It is enough for the declaration in an action for malicious prosecution, showing the plaintiff was acquitted, to allege want of probable cause, without setting out the evidence thereof; such allegation not being the assertion of a conclusion of law, but of an ultimate fact, that is, one in issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.* 9 Va.-W. Va. Enc. Dig. 505.]

Appeal from Law and Chancery Court of City of Norfolk.

Action by Isaac Klaff against the Virginia Railway & Power Company. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Rumble & Campe, of Norfolk, for plaintiff in error.

R. E. Miller and *W. H. Venable*, both of Norfolk, and *H. W. Anderson*, of Richmond, for defendant in error.

LEWIS *v.* COMMONWEALTH.

Jan. 16, 1917.

[91 S. E. 174.]

False Pretenses (§ 38*)—Indictment—Variance.—The charged offense of larceny of money by false pretenses defined by Code 1904, § 3722, was substantially proven by evidence that the money was

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.